(1)

No. 86-663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN RE: GRAND JURY PROCEEDINGS,

LORD ELECTRIC COMPANY, INC. and PETER F. MATTHEWS,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Question Presented

Whether the government may elect to divide a single conspiracy into smaller conspiracies and prosecute a defendant successively for each of the smaller conspiracies without violating the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Parties to the Proceeding

Petitioners are Lord Electric Company, Inc. and its President, Peter F. Matthews. Lord Electric Company, Inc. has the following parent company and affiliates: LECO Enterprises, Inc., Lord International, Inc., Lord Corporation of Puerto Rico, Inc., Lord Electric Company of Puerto Rico, Inc., Halfhill Electric Company, Ltd., Helmont Construction Company, Inc. and J.L. Murphy, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Lord Electric Company, Inc. ("Lord") and Peter F. Matthews ("Matthews") ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on July 31, 1986.

Opinions Below

The opinion announcing the judgment of the Court of Appeals is unreported. It appears at pages 1a-15a of the Appendix to this Petition ("Pet. App."). The order denying Petitioners' application for rehearing *en banc* appears at page 16a of the Appendix. The opinion of the United States District Court for the Eastern District of Kentucky and the Report and Recommendation of the Magistrate to the District Court, not officially reported and ordered filed under seal by the District Court, have been lodged with this Court separately under seal.

Jurisdiction

The judgment of the Court of Appeals affirming the District Court was entered on July 31, 1986. A timely petition for rehearing *en banc* was denied on September 19, 1986. Petitioners' timely motion in the Court of Appeals for a stay of the mandate pending determination of this Petition is *sub judice*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3731.

Constitutional Provision and Statute Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Statement of the Case

The Sixth Circuit's decision in this case is the first to hold that a single conspiracy, which has multiple illegal objects, may, at the election of the government, be charged and prosecuted as separate conspiracies without violating the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The Sixth Circuit expressly acknowledged that its decision is directly contrary to the holding of the Tenth Circuit in *United States* v. *Beachner Construction Co.*, 729 F.2d 1278

(10th Cir. 1984). To reach its conclusion, the Sixth Circuit coined two terms of art never before used by any court: "passive parent conspiracy" and "active parent conspiracy."[1]

The Court of Appeals created this new double jeopardy analysis *sua sponte*, without being asked to do so by any of the parties and without citing any legal or scholarly authority to support its new analysis.

1. The First Conspiracy Prosecution

On June 8, 1983, in the Western District of Washington, Petitioners Lord and Matthews were charged, along with 12 other defendants, with a conspiracy to rig bids on three electrical construction contracts, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The case was transferred for trial to Helena, Montana because of prejudicial pre-trial publicity in Seattle.[2]

On January 21, 1984, all defendants whose cases went to the jury, including Lord and Matthews, were acquitted.

2. The Second (Present) Conspiracy Prosecution

The present indictment, returned in the Eastern District of Kentucky less than six months after Petitioners Lord and Matthews were acquitted on the first indictment, charges Lord and Matthews again with a conspiracy to rig bids on one electrical construction contract in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)[3] and with three counts of mail fraud.

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1 A "Lexis" search of all federal and state court opinions for the terms "parent conspiracy," "active parent conspiracy," "passive parent conspiracy" and "passive conspiracy" showed that these terms have never before been used by any court.

2 Thus, the Court of Appeals' decision referred to the conspiracy charged in that case as the "Montana conspiracy."

3 Because the name of the project at issue in this case is "Spurlock," the Court of Appeals referred to this conspiracy charge as the "Spurlock conspiracy."

Citing, *inter alia*, overlap in time, personnel and statutory offenses in the two consecutively charged conspiracy counts, Lord and Matthews moved to dismiss the second indictment on two alternative double jeopardy grounds. First, Lord and Matthews claimed that, if all of the government's evidence were believed, there was a *direct* link between the first and second conspiracies charged and that both should be considered parts of one conspiracy for double jeopardy purposes. Second, Lord and Matthews argued that, even if the government's evidence did not show a direct link, that evidence, if believed, showed that both charged conspiracies were *indirectly* linked as parts of a larger conspiracy that encompassed these two and other alleged conspiracies. This second argument was referred to by the government as the defendants' "superconspiracy" argument—a term adopted by the District Court and the Court of Appeals.

The District Court referred the motions to a federal Magistrate, who concluded in his Report and Recommendation that Lord and Matthews' first double jeopardy argument was non-frivolous and that they had made a *prima facie* showing that both charged conspiracies were parts of one agreement. The Magistrate found, however, that the government had rebutted the Petitioners' showing by a preponderance of the evidence. The Magistrate further concluded that Lord and Matthews' second double jeopardy argument was frivolous, noting that, even if it were not, the government had rebutted it, too, by a preponderance of the evidence.

The District Court generally adopted the Magistrate's Report and Recommendation, disagreeing only with the Magistrate's conclusion that the second double jeopardy argument was frivolous. The District Court specifically found that both double jeopardy arguments were non-frivolous and that Lord and Matthews had made a *prima facie* showing that the two charged conspiracies were parts of one larger conspiracy, whether directly or indirectly linked. In denying the motion to dismiss on double jeopardy grounds, the District Court concluded, as did the Magistrate, that the government had rebut-

ted both double jeopardy arguments by a preponderance of the evidence. Because the District Court found both double jeopardy arguments to be non-frivolous, pursuant to this Court's holding in *Abney* v. *United States*, 431 U.S. 651 (1977), Lord and Matthews took an immediate interlocutory appeal from the denial of their motions. No trial date has been set.

a. The Court of Appeals' Decision

The Court of Appeals agreed with the District Court that Lord and Matthews' first double jeopardy argument was non-frivolous and that Lord and Matthews had made a *prima facie* showing on that argument. The Court of Appeals then adopted the District Court's finding that the government had met its reciprocal burden of showing that the two charged conspiracies were not directly linked as parts of a larger uncharged conspiracy.

The Court of Appeals also agreed with the District Court that the second double jeopardy argument was non-frivolous; however, unlike the District Court, the Court of Appeals did *not* require the government to rebut that argument by a preponderance of the evidence. Instead, the Court of Appeals explained:

> Even if we assume the existence of the nationwide conspiracy and even if we further assume that both the [second] agreement and the [first] agreement are, in some sense, products of the superconspiracy, the question still remains whether this relationship establishes conclusively that the indicted lesser agreements are one offense for double jeopardy purposes. The *Beachner* court [*United States* v. *Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984)], faced with similar circumstances, assumed that it did without exposition. *We believe that this assumption is invalid.* In our view, the factual nature of the parent and offspring agreements, and of the relationship between them, must be considered to determine whether

> the offspring are independent of or dependent on the parent.

Pet. App. at 11a (emphasis added).

Thus, the Sixth Circuit Court of Appeals expressly disagreed with the double jeopardy analysis of the Tenth Circuit in *United States* v. *Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984), by holding that two bid-rigging agreements which are parts of a larger agreement may be prosecuted separately without violating the Double Jeopardy Clause.

The Sixth Circuit, after acknowledging this split with the Tenth Circuit, went on to state that, in its view, even if consecutively charged conspiracies are parts of a larger conspiracy, they still may be prosecuted separately if the larger conspiracy is merely a "passive parent" of the "offspring" conspiracies. The Court of Appeals attempted to distinguish a "passive parent conspiracy" from an "active parent conspiracy" as follows:

> In some cases a parent conspiracy may appear to be an ongoing, active agreement. It may be characterized by a long-term agreement to maintain prices or limit production, by a centrally governed system of fixing prices, or by a periodic set of meetings at which industry-wide operations such as the assignment of major projects for the year are determined for the entire region covered by the conspiracy. In most cases the agreement will be expressed. A price-fixing cartel is perhaps the best example of this type of conspiracy. When such an active parent exists, the operative decisions are made at the parent level and the offspring conspiracies are merely implementations of the parent agreement. In these cases the offspring can be characterized as dependent on the parent and only one prosecution can be allowed. If a defendant is tried for the parent conspiracy or for any of the offspring agreements, it may not be indicted again.
>
> In other cases, however, the parent agreement may be passive in nature. It may appear to be no more than an

> agreement to agree, a willingness to enter into future illegal compacts, or an understanding—expressed or implied—that the participants will be receptive to requests that some future project be rigged or prices fixed. In this kind of case, the offspring agreements that actually bring those passive understandings into fruition are themselves full-blown, self-contained conspiracies, each of which may be subject to separate indictment. They may have been facilitated or even encouraged by the existence of the parent agreement, but they are distinct violations, and their common parentage is not enough to prevent their separate prosecution.

Pet. App. at 11a-12a.

In creating the terms "passive parent conspiracy" and "active parent conspiracy," the Court of Appeals made it clear that it was *not* saying that a "passive parent conspiracy" is inchoate, *i.e.*, not a prosecutable offense. On the contrary, the Court of Appeals said that, in the case of a "passive parent conspiracy":

> the government is put to an election. *It may choose to prosecute the parent conspiracy*, or it may charge the individual offspring separately, to the extent that, as here, the lesser conspiracies are not horizontally tied to one another.

Pet. App. at 12a (emphasis added). In other words, the Court of Appeals held, in the first decision ever to so hold, that a prosecutable conspiracy may be prosecuted as a whole or may be divided by the government, at its discretion, into separate sub-conspiracies, each of which may be prosecuted successively.

The Court of Appeals concluded that the "superconspiracy," as to which Lord and Matthews had made a *prima facie* showing, was a "passive parent" of the two consecutively charged conspiracies. Based upon that finding, the Court of Appeals held that the present conspiracy prosecution was not

barred by the Double Jeopardy Clause. Thus, the Court of Appeals did not require the government to rebut, by a preponderance of the evidence, the Petitioners' *prima facie* showing that the two consecutively charged conspiracies were parts of one larger conspiracy.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Opinion Is Contrary to This Court's Decision in *Braverman* v. *United States*, 317 U.S. 49 (1942).

The Court of Appeals concluded that it is permissible for the government to divide a single conspiracy into separate conspiracies and prosecute a defendant in successive indictments for those separate conspiracies. It is impossible to reconcile that holding with this Court's decision in *Braverman* v. *United States*, 317 U.S. 49 (1942).

In *Braverman*, the defendants were involved in the illegal manufacture, transportation and distribution of distilled spirits. The indictment charged them with seven counts of conspiracy, each count charging a conspiracy to violate a separate and distinct internal revenue law of the United States (*e.g.*, conspiracy to possess, conspiracy to transport, conspiracy to manufacture distilled spirits). *Id.* at 50-51. The government conceded on appeal that there was proof of only one conspiracy, but argued that, even though the defendants were not charged with any substantive offenses, they could be punished more than once for the one conspiracy based upon each offense that they had conspired to violate. This Court disagreed, holding:

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

* * * *

> The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, § 37 of the Criminal Code [current 18 U.S.C. § 371]. For such a violation only the single penalty prescribed by the statute can be imposed.

Id. at 53, 54.

Although *Braverman* involved the general federal conspiracy statute and cumulative sentences at a single trial, "the Court's reasoning seems equally applicable to bar successive prosecutions, and has been so applied." *Note, Development in the Law, Criminal Conspiracy*, 72 HARV. L. REV. 920, 964 (1959).[4]

Simply put, *Braverman* stands for the proposition that one agreement cannot be prosecuted as many, even if that one agreement has, subsumed within it, many sub-agreements. The Sixth Circuit in this case, held to the contrary and must be reversed.

2. The Court of Appeals' Opinion Is in Conflict with Every Other Circuit Court

All circuit courts which have addressed this issue have concluded that one conspiracy with multiple objects may not be prosecuted as multiple conspiracies. *United States* v. *Booth*, 673 F.2d 27, 29 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982); *United States* v. *Mallah*, 503 F.2d 971, 985-87 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States* v. *Young*, 503 F.2d 1072, 1075-76 (3d Cir. 1974); *Short* v. *United States*, 91 F.2d 614 (4th Cir. 1937); *United States* v. *Marable*, 578 F.2d 151, 153 (5th Cir. 1978); *United States* v. *Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *United States* v. *Tercero*, 580 F.2d 312,

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4 *See United States* v. *Bendis*, 681 F.2d 561, 564 (9th Cir. 1981), *cert. denied sub nom.*, *Mucci* v. *United States*, 459 U.S. 973 (1982); *United States* v. *Sturman*, 679 F.2d 840, 843 (11th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *United States* v. *Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *United States* v. *Marable*, 578 F.2d 151, 153 (5th Cir. 1978); *Short* v. *United States*, 91 F.2d 614 (4th Cir. 1937).

314-15 (8th Cir. 1978); *United States* v. *Bendis*, 681 F.2d 561, 564 (9th Cir. 1981), *cert. denied*, 459 U.S. 973 (1982); *United States* v. *Beachner Construction Co.*, 729 F.2d 1278, 1281 (10th Cir. 1984); *United States* v. *Sturman*, 679 F.2d 840, 843 (11th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). Indeed, the Sixth Circuit, which decided this case, had previously adhered to this rule. *United States* v. *Sinito*, 723 F.2d 1250 (6th Cir. 1983), *cert. denied*, 105 S.Ct. 86 (1984); *United States* v. *Jabara*, 644 F.2d 574 (6th Cir. 1981). In its opinion in this case, however, the Sixth Circuit did not acknowledge that it was deviating from this rule, nor did it cite any authority for its conclusion to the contrary.

The Sixth Circuit did acknowledge that its conclusion was in conflict with the decision of the Tenth Circuit in *United States* v. *Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984). Pet. App. at 11a. In *Beachner*, the defendant was tried and acquitted of rigging bids on a highway construction project in Kansas. Later, that defendant was indicted again for rigging bids on different highway construction projects in different parts of Kansas. The second indictment was dismissed by the District Court on double jeopardy grounds. The Court of Appeals affirmed, agreeing with the District Court that both indicted conspiracies were "each part of a single, continuing conspiracy which had existed in Kansas since the early 1960's. . . . [T]o prosecute [the defendant] under the second indictment would effectively put it in jeopardy twice for the same offense in violation of the fifth amendment to the United States Constitution." *Id.* at 1279.

The Tenth Circuit's decision in *Beachner* was in accord with long settled law that a single conspiracy cannot be divided up into separate conspiracies to permit the prosecution of a defendant more than once for a single agreement. *United States* v. *Castro*, 629 F.2d at 461 *citing*, *Braverman* v. *United States*, 317 U.S. 49 (1942) ("In the realm of criminal conspiracies, it is settled that the prosecution of a single conspiracy as two separate conspiracies violates a defendant's double jeopardy guarantee . . . .") Thus, every circuit court that has

reviewed a double jeopardy claim involving successive conspiracy prosecutions has analyzed the issue by asking: Were the charged conspiracies parts of one agreement? *See, e.g.*, *United States* v. *Bendis*, 681 F.2d at 564; *United States* v. *Sturman*, 679 F.2d at 840; *United States* v. *Castro*, 629 F.2d at 456; *United States* v. *Marable*, 578 F.2d at 153 (all of which cite *Braverman* as authority for this analysis).

The Court of Appeals in this case held that the decision in *Beachner* was "invalid" and rejected the double jeopardy analysis used by every other court. The Court here held that the government may choose whether to prosecute one larger agreement or to successively prosecute agreements that are part of that larger agreement. Thus, there is a clear split in the circuits which this Court should resolve.

3. The Court of Appeals' Opinion Rewrites Long-Settled Conspiracy Law and Requires the District Courts to Use an Analysis that Is Unworkable

The Sixth Circuit's decision in this case has radically rewritten double jeopardy law as it applies to conspiracy cases and has created a new and unworkable precedent which must be corrected immediately.

Because the commission of a substantive crime is not a prerequisite to a conviction for conspiracy, courts have long recognized that conspiracy is the "darling of the modern prosecutor's nursery." *Harrison* v. *United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.).[5]

Given the fact that conspiracy is essentially a crime of the mind (as opposed to deed), the most crucial question, in terms of the Double Jeopardy Clause with regard to consecutive conspiracy prosecutions, concerns the scope of the alleged

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5 When he coined the phrase "darling of the modern prosecutor's nursery," Learned Hand could hardly have envisaged that that nursery would be occupied 60 years later by "passive parent conspiracies," "active parent conspiracies" and "offspring conspiracies"—terms created by the Sixth Circuit in this case.

conspiracies. If the evidence shows that both charged conspiracies are smaller agreements within a larger agreement to achieve a number of illegal objects, then "the [smaller] agreements [are] merely steps in the formation of the larger and ultimate more general conspiracy." *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947).[6]

Because of the difficulty in defining the scope of an agreement (or series of agreements which are parts of a larger agreement), the courts have recognized the danger that overzealous prosecutors will divide a single conspiracy with multiple objects into separate conspiracy prosecutions and will prosecute them successively until a conviction is obtained—or until a sufficient number of convictions are obtained to satisfy the prosecutor. Given the fact that "the danger of abusive reprosecution is particularly great when conspiracy is involved," *Note, "Single vs. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes*, 65 MINN. L. REV. 295, 306 (1980), the courts have developed two separate tests for evaluating double jeopardy claims—one for successive non-conspiracy prosecutions and one for successive conspiracy prosecutions.[7]

Following this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), in non-conspiracy cases, the lower courts have generally applied the "same evidence test" to claims of double jeopardy involving successive indictments. Essentially, that test is whether the second charge requires proof of a fact that the first charge did not. *Id.* at 304; *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977).

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6 In an analogous situation, this Court observed in *Ashe* v. *Swenson*, 397 U.S. 436, 445 n.10 (1970), that "[i]n more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction."

7 As noted above, these courts generally have based their analyses upon this Court's holding in *Braverman* v. *United States*, 317 U.S. 49 (1942).

When successive indictments allege separate *conspiracies*, however, the courts have recognized that the "same evidence test" is "functionally inadequate" because prosecutors could artfully draft indictments to allege different facts in furtherance of the same conspiracy—thus violating the Double Jeopardy Clause. *United States* v. *Bendis*, 681 F.2d 561, 565 (9th Cir. 1981). *Accord*, *United States* v. *Mallah*, 503 F.2d at 985; *United States* v. *Castro*, 629 F.2d at 461; *United States* v. *Sturman*, 679 F.2d at 843. Thus, the circuit courts have almost universally analyzed double jeopardy claims in conspiracy cases by asking whether, based upon the "totality of the circumstances," the two conspiracies charged were in reality parts of one agreement. *See*, *e.g.*, *United States* v. *Thomas*, 759 F.2d 659, 662 (8th Cir. 1985); *United States* v. *Sturman*, 679 F.2d at 843; *United States* v. *Booth*, 673 F.2d at 29; *United States* v. *Castro*, 629 F.2d at 461; *cf. United States* v. *Lurz*, 666 F.2d 69, 74 (4th Cir. 1981), *cert. denied*, 459 U.S. 843 (1982) (reserving decision on whether the "totality of the circumstances" test should be applied in place of the "same evidence test").

In this case, the Sixth Circuit has ignored the danger of overzealous prosecution which gave rise to the abandonment of the "same evidence test" in conspiracy cases and has again opened the door to multiple prosecutions for the same agreement provided the overall agreement is deemed "passive."

In addition to this fatal oversight, the Sixth Circuit's opinion is also an invitation to judicial disaster as the District Courts now attempt to distinguish between "active" and "passive parent conspiracies" in response to future double jeopardy motions. The Sixth Circuit's decision in this case itself demonstrates how unworkable these terms are.

In attempting to differentiate between an "active parent" and a "passive parent" conspiracy, the Sixth Circuit was compelled to recognize that both types of conspiracies have many similarities. Thus, under the Court of Appeal's analysis, *both* "active" and "passive" parent conspiracies may be "ex-

pressed" or "implied," with the "active" parent being "expressed" "in most cases." Pet. App. at 11a-12a. The Court of Appeals further stated that in *both* types of conspiracies, the parent conspiracies are themselves prosecutable offenses, not inchoate crimes. *Id.*

The Sixth Circuit also acknowledged that in *both* types of conspiracies, each "offspring" represents a part of the parent, yet, at the same time, is a cognizable "agreement" under the conspiracy laws. *Id.* The Court of Appeals further stated that when "an active parent exists, the operative decisions are made at the parent level and the offspring conspiracies are merely implementations of the parent agreement". *Id.* Similarly, the Court of Appeals stated that, in the case of a "passive parent conspiracy," the "offspring agreements . . . may have been facilitated or even encouraged by the existence of the parent agreement." *Id.*

Given these similarities, Petitioners respectfully submit that distinguishing between the two types of conspiracies is impossible. Instead, Petitioners submit that, in accord with all previous decisions, once a Court recognizes that a conspiracy is independently prosecutable, double jeopardy bars the prosecution of separate agreements that are subsumed within the larger agreement.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Dated: New York, N.Y.
October 20, 1986

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-6155

Decided and Filed July 31, 1986

IN RE:

GRAND JURY PROCEEDINGS

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Before:

JONES, WELLFORD AND NELSON, *Circuit Judges.*

JONES, *Circuit Judge.* Defendants appeal the district court's denial of their pretrial motion to dismiss the indictment against them. They assert that this prosecution is barred by the double jeopardy clause because the conspiracy charged in the indictment is allegedly part of a conspiracy for which they have earlier been tried. The court below concluded that separate conspiracies exist. We agree and affirm.

On June 14, 1984, a federal grand jury sitting in Covington, Kentucky, indicted Lord Electric Company (Lord Electric), two of its executives, Peter Matthews and Donald McCabe, and Wente Construction Company (Wente Construction) for conspiring to rig bids on the electrical work for Unit II of the

Spurlock Generating Station (Spurlock), a coal-fired electrical power plant in Maysville, Kentucky. The indictment charged a violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), and two counts of mail fraud, 18 U.S.C. § 1341 (1982). Wente Construction pled guilty; McCabe is awaiting trial. Only Lord Electric and Matthews are involved in this appeal.

The indictment alleged, and testimony before the grand jury tended to show, the following facts. In the week before the May 9, 1978 bid date on the Spurlock project, Matthews telephoned Robert Vandivender, then the director of a six-state regional division of The Howard P. Foley Company (the Foley Company) based in Richmond, Virginia. Vandivender was preparing to bid on Spurlock in a joint venture with Wente Construction. Matthews asked him to "support" Lord Electric's bid on the project, a euphemism that means to submit a higher bid than Lord Electric to insure that Lord Electric would get the contract. Vandivender agreed, in part because he believed Lord Electric had supported his division of the Foley Company in a 1976 project in Virginia called Union Camp. Vandivender said he would have to get consent from Wente Construction, however, and he spoke with Elton Arment, then president of Wente Construction. Arment then telephoned Matthews and the two agreed that in exchange for Wente Construction's "support," Lord Electric would pay Wente $50,000 to cover Wente's costs incurred in preparing the bid. This payment was agreed to allegedly because, unlike the Foley Company, Wente Construction had had no previous "favor" from Lord Electric. The $50,000 was later paid through two false invoices sent by Wente Construction to McCabe at Lord Electric.

After reaching this agreement with Arment, Matthews phoned Vandivender and gave him the figure that the Foley/Wente joint venture should bid. Vandivender testified that he had independent control of his regional division of the Foley Company and therefore he did not consult with his superiors when he decided to consent to Matthews' request. Lord Electric was awarded the contract on a bid of $9,176,000; the Foley

Company and Wente Construction had originally been prepared to bid $7,840,000.

Lord Electric and Matthews moved to dismiss the indictment on double jeopardy grounds. One basis of the motion was that this alleged conspiracy is linked to another alleged conspiracy involving bid-rigging on three nuclear power plants in the states of Washington and Indiana, of which the defendants had previously been tried and acquitted. Alternatively, they argued that the government's evidence shows that the Spurlock agreement was part of a larger "superconspiracy" to rig bids on electric projects across the country by the five largest electrical contractors in the nation, and, having already been tried for part of that superconspiracy, they cannot be indicted for another part. The motion was submitted on a voluminous documentary record to a magistrate who ruled that (1) the defendants had made a non-frivolous showing on their first theory, but that the Government had sufficiently rebutted it, and (2) the defendants had not made a non-frivolous showing on the superconspiracy theory, but, even if they had, it was rebutted. The district court adopted the magistrate's findings except that it ruled that a non-frivolous showing had been made on the second theory as well, entitling the defendants to an immediate review of the rejection of both theories. See *United States* v. *Abbey* [sic] 431 U.S. 651, 662 (1977).

The defendants also appeal the court's refusal to grant access to certain transcripts from other grand juries, which they claim would be material in presenting their superconspiracy argument. Finally, the defendants argue that the magistrate erred in not granting them an evidentiary hearing on their motion to dismiss.

I

The double jeopardy clause of the fifth amendment prohibits multiple prosecutions for the same offense. Thus if the conspiracy charged in this case and the conspiracy of which the defendants were indicted and acquitted in another case were both part of a single agreement, this indictment is barred and

must be dismissed. See *Braverman* v. *United States*, 317 U.S. 49, 54 (1942). The burden is on the defendant to show that a single conspiracy exists, but, because the government typically has better access to evidence, that burden is satisfied if the defendants advance a non-frivolous or prima facie showing of a single conspiracy. *United States* v. *Jabara*, 644 F.2d 574, 576-77 (6th Cir. 1981). The burden then shifts to the government to show separate conspiracies by a preponderance of the evidence. *Id.* In conspiracy prosecutions, the multiple/single conspiracy issue is determined by applying a "totality of the circumstances" test rather than the more limited "same evidence" test normally applied to double jeopardy reviews of substantive offenses. *Id.* at 577; *United States* v. *Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983). This test requires the trial court

> to consider the elements of: 1) time; 2) persons acting as co-conspirators; 3) the statutory offenses charged in the indictments; 4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case; and 5) places where the events alleged as part of the conspiracy took place.

Sinito, 723 F.2d at 1256. The ultimate question of whether the evidence shows one agreement or more than one agreement. The finding of fact by the lower court that the government had proven by a preponderance of the evidence that multiple conspiracies existed can be set aside only if it is clearly erroneous. *Jabara*, 644 F.2d 577. The reviewing court is bound to accept this finding unless it "is left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1958)).

A.

Theory I: Spurlock and the WPPSS Conspiracy

In 1983 defendants Lord Electric and Matthews were indicted, along with five other companies and their representa-

tives, of conspiring to rig bids on three nuclear power plants in Washington and Indiana. The plants were the Washington Public Power Supply System (WPPSS) 1 & 4, WPPSS 3 & 5, both in Washington, and Marble Hill in Indiana. According to the indictment in that case, the conspirators allocated the WPPSS 1 & 4 project to a joint venture of the Foley Company and Wismer & Becker Contracting Engineers on a bid price of $122 million. The bidding occurred on May 9, 1978, the same day as the Spurlock bidding. The Foley Company was represented in this conspiracy by its national president, Bancroft T. Foley, Jr.; Vandivender and the Richmond office of the Foley Company were not involved. WPPSS 3 & 5 was allegedly assigned to Fischbach and Moore, Inc., on a $151 million bid; the bidding took place in December 1978 and again in August 1979. L.K. Comstock and Company was originally to have joined Fischbach and Moore on this project but withdrew. The Marble Hill project was allegedly given to a joint venture of Lord Electric and Commonwealth Electric Company, but it was not until a third round of bidding (necessitated by job specification changes) that Lord/Commonwealth had the lowest bid and obtained the contract. The bidding occurred between June 1978 and January 1979; the award price was $98 million.

The agreement to divide these projects among the six companies allegedly arose at meetings among company executives in April and May of 1978 in Palm Springs and Long Beach, California. Matthews was present at each meeting. Testimony at trial, which was held in Montana, indicated that the rigging of the two WPPSS projects was specifically discussed at these meetings, but only one participant could recall that Marble Hill was mentioned and he could recall no agreement about it. There was no evidence that Spurlock was mentioned at the meetings. Testimony also showed that, as a result of Lord Electric's support of the Foley Company/Wismer & Becker bid on WPPSS 1 & 4, the Foley Company would owe Lord Electric an unspecified "favor." It was the government's theory in the Montana case that Marble Hill was the "favor" or *quid pro quo* for WPPSS 1 & 4.

In the present case, the defendants contend under their first theory that Spurlock was the *quid pro quo* for WPPSS 1 & 4. If this were true it would establish that the bid-riggings of both projects were the products of one agreement. The evidence in support of the defendants' prima facie claim on this theory is circumstantial. They first attack the government's theory in the Montana trial that Marble Hill was the consideration for WPPSS 1 & 4. They point to the fact that only one Montana witness could recall that Marble Hill was discussed at the California meetings and none could say that an agreement was reached concerning that project. Further they note that Lord Electric did not emerge as low bidder on Marble Hill until the third round of bidding. These facts tend to show that Marble Hill was not rigged, or at least not as an exchange for WPPSS 1 & 4, thus opening the door for Spurlock to fit that bill. Second, the defendants assail the implication inherent in Vandivender's grand jury testimony that Lord Electric's support for the Foley Company on the Union Camp project was the reason Vandivender agreed to support Lord Electric on the Spurlock bidding. The defendants stated that they could offer evidence that Union Camp was in fact not rigged.

Even if both of these assertions were borne out it would not take the defendants' claim very far. The assertions establish no more than that Marble Hill was not the "favor" that the Foley Company owed to Lord Electric and that Spurlock could have served that function. If these were the only bases for the defendants' claim of a single conspiracy, we would not agree that the defendants had met their initial burden of putting forth a non-frivolous claim. The strength of the defendants' prima facie showing lies in other circumstances: Matthews allegedly knew that the Foley Company owed Lord Electric a favor as a result of the WPPSS 1 & 4 agreement at the California meeting; when Matthews was receiving from the Foley Company the price Lord Electric should bid on WPPSS 1 & 4, he was at the same time phoning Vandivender at the Foley Company to seek support for and arrange the Spurlock bidding; and WPPSS 1 & 4 and Spurlock were bid on the same

day. These circumstances are sufficient to create a non-frivolous showing. We now turn to the *Sinito* factors to determine whether the court was correct in ruling that the government has rebutted this showing by proving the existence of multiple conspiracies by a preponderance of the evidence.

The first *Sinito* factor, time, seems facially to work strongly against the government's case: the agreements and bidding on both the Spurlock and WPPSS 1 & 4 projects occurred at the same time. The importance of this factor in bid-rigging cases is somewhat diminished, however, for the conspirators cannot control the timing of their activities. Bids can be rigged only when bids are solicited by the victims. Therefore, the coincidence of these two agreements in time is as likely to be fortuitous as it is to be interdependent.

The second factor, overlap of conspirators, supports the government's position. On the corporate level there was significant overlap. Lord Electric and the Foley Company, by name, were involved in both agreements. Watson-Flagg Electric Company, a subsidiary of Fischbach and Moore, which had been "given" the WPPSS 3 & 5 project, bid on Spurlock. On the other hand, two other Spurlock bidders, Wente Construction and Sargent Electric Company, were not involved in the Montana case, while three Montana participants, Comstock, Commonwealth and Wismer and Becker, did not bid on Spurlock. On an individual level, however, the overlap is less significant. While Matthews at Lord Electric was directly involved in both agreements, he dealt with distinct individuals at the Foley Company. Bernard Foley, the national president, was involved in the WPPSS 1 & 4 arrangements but not in the Spurlock transaction, and Vandivender, who was autonomously in charge of his regional division, made the agreement on Spurlock with Matthews without consulting other Foley company officials. There was no evidence that Vandivender was aware of the WPPSS 1 & 4 scheme. The other individuals involved in Spurlock, Wente Construction's Arment and Lord Electric's McCabe, were also not involved in WPPSS 1 & 4. Matthews, although a key player in both agreements, represents the only overlap among personnel to appear on the

record, thus attenuating the circumstantial link between the two projects.

The third *Sinito* factor, the offenses charged, tends to show a single conspiracy because precisely the same statutory offenses—violations of section 1 of the Sherman Act—are alleged in each indictment.

We will skip ahead in this analysis to *Sinito* factor five, location. Like the time factor, the location of projects that are to be rigged is a fortuitous element not in the control of the conspirators. Thus, the fact that the WPPSS and Spurlock projects were in different regions of the country does not necessarily indicate separate schemes. On the other hand, it is noteworthy that, although the participants could not choose the venues of their schemes, the WPPSS 1 & 4 project in fact took place in a region over which Vandivender had no control or interest. Vandivender testified to the grand jury that he received a commission on work performed by his division of the Foley Company. WPPSS 1 & 4 could yield him no commission because it was not within his region, making it unlikely that he would relinquish a commission on Spurlock on account of WPPSS 1 & 4 agreement.

The fourth factor, the nature and scope of the activities, is the most indicative of separate conspiracies. While both indictments alleged bid-rigging of electrical power plants, the two types of projects involved are vastly different is size and complexity. The winning bids in the Montana case ranged from $98-151 million, figures that dwarf the $9 million that Lord Electric received on the Spurlock contract. Further, the time and resources that the companies committed to performing the contracts in the Montana case, which involved nuclear power plants, would seem to have little in common with the amount and type of work required for the Spurlock coal-fired plant. Matthews had testified in the Montana case that the executives "discussed nuclear projects" at the California meetings and the problems that were "unique to large projects and especially unique to nuclear projects." A reasonable inference from these statements is that the major nuclear projects in the Montana

case were distinct in scope and nature from the conventionally-powered Spurlock project.

In conclusion our analysis of the five *Sinito* factors compels us to conclude that the lower court's finding that the Montana indictment and the indictment in this case allege separate conspiracies is not clearly erroneous and must be upheld.

B.

Theory II: the "Superconspiracy"

Lord Electric and the four other major electrical contractors in the nation have, among them, been the targets of at least six indictments across the country all alleging conspiracies to rig bids on large electrical contracting projects. The defendants contend that the government's allegations and evidence, if believed, show the existence of a single, broad conspiracy among these five industry leaders and that the separately indicted schemes are the by-products or results of this one "superconspiracy." They argue that the government has artificially carved up this broad conspiracy, and, as a result the defendants have been twice indicted for the same offense.

The defendants' theory here differs from their first theory in one major respect. While their first argument proposed a horizontal link between the Spurlock agreement and the Montana conspiracy, they argue here that all of the indicted conspiracies are linked vertically to a common broader agreement. In other words, the defendants argue here that while the direct connection between WPPSS 1 & 4 and Spurlock may not be so close that the two were mutually dependent on each other, they are both issue of the same parent and that relationship is enough to invoke the protection of the double jeopardy clause.

In the proceedings below, the defendants relied primarily on *United States* v. *Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984), to meet their burden of showing a non-frivolous claim of double jeopardy. *Beachner* involved a bid-rigging of highway construction projects in Kansas. The defendants there had been tried and acquitted on charges arising from the rigging of one such project and were subsequently indicted for

the rigging of another set of projects elsewhere in the state. *Id.* at 1279. The district court granted the defendants' motion to dismiss the second indictment on double jeopardy grounds on a finding that both indicted schemes "were each part of a single, continuing conspiracy which had existed in Kansas since the early 1960's" *Id.* In affirming the lower court, the court of appeals noted the presence of four factors that indicated the existence of a single, state-wide conspiracy. They were

> (1) the existence of common bid-rigging jargon prevalent industry-wide, (2) the participants had no fear of initiating the setup of a bid, (3) the perpetual nature of the bid-rigging scheme, and (4) the existence of a tacit mutual understanding among competitors of a single, continuing conspiracy.

Id. at 282. The court drew this list of factors from *United States* v. *Consolidated Packaging*, 575 F.2d 117 (7th Cir. 1978), where the Seventh Circuit had noted the existence of similar circumstances in holding that an indictment for a nationwide conspiracy to fix prices in the cardboard container industry charged a single conspiracy, not multiple conspiracies, and thus the proof produced no prejudicial variance.

The magistrate in this case considered the four *Beachner* factors, found that they were not present and ruled, therefore, that the defendants had failed to present a non-frivolous claim. The district court ruled otherwise, concluding without analysis that a non-frivolous showing had been made. We agree with the district court's implicit finding that, applying the *Beachner* factors, the defendants have made a non-frivolous showing of at least a tacit understanding among the major contractors that bid-rigging was an acceptable practice in the industry.

The district court went on to adopt the magistrate's alternate finding that the government had rebutted this prima facie case by showing that the nationwide superconspiracy did not in fact exist. This finding was based on an application of the *Sinito* factors to the superconspiracy claim. We do not believe, however, that the *Sinito* factors are useful to the final deter-

mination of whether this superconspiracy is or is not shown by the evidence. The *Sinito* analysis is tailored to the task of comparing two indicted offenses, not to the detection of an unindicted broader agreement. We need not decide, however, whether the district court clearly erred in concluding that the superconspiracy did not exist, for we see a more fundamental error in the defendants' argument.

Even if we assume the existence of the nationwide conspiracy and even if we further assume that both the Spurlock agreement and the Montana conspiracy are, in some sense, products of the superconspiracy, the question still remains whether this relationship establishes conclusively that the indicted lesser agreements are one offense for double jeopardy purposes. The *Beachner* court, faced with similiar circumstances, assumed that it did without exposition. We believe that this assumption is invalid. In our view, the factual nature of the parent and offspring agreements, and of the relationship between them, must be considered to determine whether the offspring are independent of or dependent on the parent.

In some cases a parent conspiracy may appear to be an ongoing, active agreement. It may be characterized by a long-term agreement to maintain prices or limit production, by a centrally governed system of fixing prices, or by a periodic set of meetings at which industry-wide operations such as the assignment of major projects for the year are determined for the entire region covered by the conspiracy. In most cases the agreement will be expressed. A price-fixing cartel is perhaps the best example of this type of conspiracy. When such an active parent exits, the operative decisions are made at the parent level and the offspring conspiracies are merely implementations of the parent agreement. In these cases the offspring can be characterized as dependent on the parent and only one prosecution can be allowed. If a defendant is tried for the parent conspiracy or for any of the offspring agreements, it may not be indicted again.

In other cases, however, the parent agreement may be passive in nature. It may appear to be no more than an agreement

to agree, a willingness to enter into future illegal compacts, or an understanding—expressed or implied—that the participants will be receptive to requests that some future project be rigged or prices fixed. In this kind of case, the offspring agreements that actually bring those passive understandings into fruition are themselves full-blown, self-contained conspiracies, each of which may be subject to a separate indictment. They may have been facilitated or even encouraged by the existence of the parent agreement, but they are independent of it. The offspring conspiracies are distinct violations, and their common parentage is not enough to prevent their separate prosecution.

In this second class of cases, we think the government is put to an election. It may choose to prosecute the parent conspiracy, or it may charge the individual offspring separately, to the extent that, as here, the lesser conspiracies are not horizontally tied to one another. The government may not do both, however. The offspring agreements are distinct from each other, but the vertical relationship of each to the passive parent conspiracy cannot be denied. Thus, an indictment for the parent conspiracy sweeps within its terms the lesser active progeny and the latter cannot be tried again. Similarly, the trial of one offspring agreement is a trial on part of the passive parent, and the whole cannot be subsequently prosecuted.

A review of the record and the arguments of the defendants show that this is one of the second class of cases. Assuming, without deciding, that the superconspiracy that defendants describe exists, the evidence in the record shows beyond doubt that it was no more than a passive understanding that bid-rigging was an accepted way to do business. It was well known in the industry that the practice occurred, and the means and jargon employed in each agreement were often identical, but agreements to rig individual project were made only when opportunities arose and as our summaries of the Spurlock and Montana case transactions show, the arrangements had to be negotiated "from scratch" each time. While these negotiations were sometimes little more than an exchange of code words and figures, there is no evidence that the background under-

standing was the type of active, controlling super-agreement that would make Spurlock and the others predetermined executions of the general plan. The government has not indicted the nationwide superconspircy; it has chosen instead to prosecute the lesser agreements individually. We hold that, in view of the nature of the nationwide conspiracy described by the defendants, the conspiracy charged in the indictment before us is, as a matter of law, not the "same offense" as the other offspring conspiracies for which the defendants have been tried or indicted and, therefore, this indictment should not be dismissed.

II

The defendants assert that the court erroneously denied their motion to compel the government to release to them the transcripts of a pending grand jury investigation. Release was sought under a pretrial stipulation that permitted the defendants access to "all grand jury transcripts material to the preparation of the defense." Specifically, the defendants maintain that these transcripts were material to the presentation of their superconspiracy double jeopardy argument. The magistrate viewed these documents *in camera* along with all other documents submitted by the parties and some additional transcripts requested by the magistrate before ruling on the double jeopardy motion. He concluded that the requested documents gave no support to the defendants' double jeopardy claims and, therefore, were not material to their defense. This finding removes the documents from the scope of the discovery stipulation and, therefore, the denial of the motion to compel was not in error. This does not mean that the magistrate's determination is unreviewable. The district court also examined the documents in dispute and affirmed the magistrate's ruling based on its own review. We find no error in the denial of the motion to require the government to release the defendants' transcripts of the pending grand jury investigation.

III

The defendants' final assertion of error is that they were wrongly denied an evidentiary hearing on their double jeopardy motion. The defendants correctly state the general rule: once a defendant has put forth a non-frivolous claim of double jeopardy, the court should hold an evidentiary hearing to resolve any factual disputes that arise. *Jabara*, 644 F.2d at 576; *United States* v. *Inmon*, 568 F.2d 326, 331 (3d Cir. 1977). In this case, voluminous documentary evidence, including grand jury transcripts and testimony from the trial of the Montana case, were submitted to the court and transferred to the magistrate for review and recommendation. The defendants, by letter, then requested both an oral argument and an evidentiary hearing on their motion. A hearing was held at which the merits of the motion were argued. Counsel for defendants did not then again request an evidentiary hearing or attempt to enter evidenced, although counsel did state he had evidence to present on the issue of whether the Union Camp project was rigged. This hearing was held on October 30, 1984; the defendants made no further request for an evidentiary hearing, or inquiry about when one would be held, until after the magistrate's report was filed on July 2, 1985.

The defendants state that, given an opportunity, they would have presented testimonial evidence to show that the Marble Hill project was not rigged, to help resolve the conflict in the Montana trial testimony on whether Marble Hill was mentioned at the California meetings, and to rebut Vandivender's assertion before the Covington grand jury that the Union Camp project was rigged and served as the *quid pro quo* for the Spurlock agreement. As discussed above, however, *see supra* at 5-6, these issues were only marginally relevant to the ultimate question of whether Spurlock was the *quid pro quo* from the Foley Company to Lord Electric for the WPPSS 1 & 4 project and findings in favor of the defendants on these issues would have not changed the outcome on their motion.

We do not condone the magistrate's failure to provide an evidentiary hearing, but the circumstances in this case do not

warrant reversal on that ground. The defendants' failure to raise their request at the hearing before the magistrate, and for eight months thereafter, indicates that their desire to present live testimony was not as keenly felt then as it is now. The government was not opposing the request and both parties had ample opportunity to and did present extensive documentary evidence. Finally, the issues that defendants wished to contest at a hearing are not determinative, and we are satisfied that the defendants were not prejudiced by their inability to present them.

The order denying the defendants' motion to dismiss is AFFIRMED and the case is REMANDED for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-6155

IN RE:

GRAND JURY PROCEEDINGS

Before:

JONES, WELLFORD and NELSON, *Circuit Judges.*

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, *Clerk*

No. 86-663

In the Supreme Court of the United States

OCTOBER TERM, 1986

LORD ELECTRIC COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the bid-rigging conspiracy charged in the indictment is not the same offense as other conspiracies for which petitioners had previously been prosecuted.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 797 F.2d 1377. The opinion of the district court and the recommendation of the magistrate are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1986. A petition for rehearing was denied on September 19, 1986 (Pet. App. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the so-called "Spurlock conspiracy," an alleged conspiracy to rig bids in 1978 on an electrical construction project for the coal-powered Spurlock II Generating Station in Maysville, Kentucky. Petitioner Lord Electric Company (Lord) is a contractor that bids on large electrical projects, and petitioner Peter F. Matthews is its president. On June 14, 1984, a federal grand jury in the Eastern District of Kentucky indicted petitioners and others for the Spurlock conspiracy. Count one of the indictment charged a violation of Section 1 of the Sherman Act, 15 U.S.C. 1; counts two and three charged violations of the mail fraud statute, 18 U.S.C. 1341. Pet. App. 1a-2a.[1]

Petitioners had previously been acquitted of criminal participation in the so-called "WPPSS conspiracy." The WPPSS conspiracy involved bid rigging on electrical work for nuclear power projects run by the Washington Public Power Supply System and the Public Service Company of Indiana. Pet. App. 4a-5a.

Petitioners moved to dismiss the indictment on the basis of double jeopardy. Petitioners' primary claim was that the Spurlock conspiracy charged in this case was actually part of the WPPSS conspiracy. Alternatively, petitioners argued that both the Spurlock and WPPSS conspiracies were part of an even larger conspiracy involving the nation's largest electrical contractors. Petitioners did not define the scope of their alleged "superconspiracy" and presented no evidence establishing the existence of the superconspir-

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[1] Wente Construction Company, which was also indicted, pleaded guilty. Donald W. McCabe, a vice president of Lord, was indicted and is awaiting trial.

acy.[2] Petitioners also did not explain why, if such a superconspiracy existed, they had not urged it as a bar to any of their prior prosecutions.[3] Petitioners sought to compel further discovery of grand jury transcripts that they hoped might help to establish their claim. Pet. App. 9a-13a.[4]

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[2] Petitioners noted that the major electrical contractors had been prosecuted for bid rigging and that there were some similarities in how bids were rigged on particular projects. Thus, although petitioners presented no direct evidence establishing that there was a single nationwide conspiracy to rig bids on electrical projects, they argued that the existence of such an agreement could be inferred.

[3] Before the decision in this case, Lord had been indicted for bid rigging on electrical construction projects three other times. After its acquittal in the WPPSS conspiracy case, Lord was indicted, tried, and convicted of bid rigging on electrical construction projects in Pittsburgh and Philadelphia. Lord stood trial in Pittsburgh without claiming any double jeopardy defense. In fact, Lord argued in Pittsburgh that the conspiracy charged—rigging bids on electrical construction contracts at United States Steel's Western Pennsylvania Works—was too broad and that the indictment should instead have charged at least 14 separate conspiracies, one for each of the jobs shown at trial to have been rigged. *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984), cert. denied, 470 U.S. 1029 (1985). In Philadelphia, Lord made a narrow double jeopardy claim, arguing only that the conspiracy charged —one to rig bids at United States Steel's Fairless Works— was part of the same conspiracy for which it had been convicted in Pittsburgh. The court of appeals rejected that claim. *United States* v. *Sargent Electric Co.*, 785 F.2d 1123 (3d Cir. 1986), cert. denied, No. 85-1936 (Oct. 6, 1986).

[4] Petitioners have not sought review in this Court of the denial of their discovery motions by the magistrate and the district court, which was affirmed by the court of appeals (Pet. App. 13a).

1. On October 24, 1984, the district court referred the double jeopardy and discovery motions to a magistrate (C.A. App. 357). The parties submitted extensive briefs and evidence, including previous indictments, grand jury excerpts, and former trial transcripts bearing on these issues. In a thorough opinion (*id.* at 418-468), the magistrate concluded that the defendants had made a nonfrivolous showing that the Spurlock and WPPSS conspiracies were part of a single conspiracy, but that the government had refuted that showing by a preponderance of the evidence (*id.* at 439-454).[5] The magistrate rejected as

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[5] In the WPPSS case, the government had alleged that the defendants had conspired to allocate nuclear power plant projects among three sets of contractors: WPPSS 1 and 4 to a joint venture of The Howard P. Foley Co. (Foley) and Wismer & Becker Contracting Engineers, Inc.; WPPSS 3 and 5 to Fischbach and Moore, Inc.; and Marble Hill to a joint venture of Lord and Commonwealth Electric Company. The projects ranged in price from $98 to $151 million. Testimony at the WPPSS trial established that these projects were discussed at two meetings in California: one at La Quinta Resort in Palm Springs in April 1978, and one at the Queensway Hilton in Long Beach in May 1978. There is no evidence from the WPPSS trial that any projects other than nuclear power projects were discussed or considered at these meetings. Pet. App. 5a.

In the alleged Spurlock conspiracy, four companies submitted bids for the Spurlock project: Lord, Foley, Sargent Electric Company, and Watson-Flagg Electric Company, Inc. Foley and Wente Construction Co. had formed a joint venture to submit a bid for the Spurlock project. Robert J. Van Divender, who had been in charge of Foley's branch office in Richmond, Virginia, testified that he agreed with petitioner Matthews to rig the $9 million Spurlock project in favor of petitioner Lord because in 1976 Lord had agreed to support Van Divender in rigging an $8 million Union Camp Corporation job in Franklin, Virginia. Wente officials also went

frivolous the defendants' superconspiracy theory (*id.* at 454-459). Assuming that the claim was not frivolous, however, the magistrate concluded that the government had rebutted the showing by a preponderance of the evidence (*id.* at 459-462). The magistrate also stated that, in his examination of "in excess of 200 grand jury transcripts, no substantive suggestion of evidentiary support for the superconspiracy argument arose" (*id.* at 463 (footnote omitted)).

The district court generally adopted the magistrate's findings and conclusions as to the double jeopardy and discovery claims. It held, however, that defendants had made a nonfrivolous showing on their superconspiracy claim as well as their narrow single conspiracy claim. C.A. App. 479-480.

2. The court of appeals affirmed. It began by noting that, under *Braverman* v. *United States*, 317 U.S. 49 (1942), "if the conspiracy charged in this case and the conspiracy of which the defendants were indicted and acquitted in another case were both part of a single agreement, this indictment is barred and must be dismissed" (Pet. App. 3a-4a). The court also held that "the multiple/single conspiracy issue is determined by applying a 'totality of the circumstances' test rather than the more limited 'same evidence' test" (*id.* at 4a).

With respect to petitioners' primary argument that the Spurlock and WPPSS conspiracies were part of a single agreement to rig bids, the court held that the district court's finding that the WPPSS and Spurlock indictments charged separate conspiracies was not

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along with the scheme because, although they had never met Matthews and did not owe Lord any "favors," Matthews agreed to pay Wente $50,000. Pet. App. 2a.

clearly erroneous (Pet. App. 6a-9a). Petitioners have not sought review of that holding.

The court also rejected petitioners' alternative claim of a superconspiracy, reasoning as follows (Pet. App. 12a):

> Assuming, without deciding, that the superconspiracy that defendants describe exists, the evidence in the record shows beyond doubt that it was no more than a passive understanding that bid-rigging was an accepted way to do business.[6] It was well known in the industry that the practice occurred, and the means and jargon employed in each agreement were often identical, but agreements to rig individual project[s] were made only when opportunities arose and * * * the arrangements had to be negotiated "from scratch" each time.

Thus, the court of appeals concluded that, "in view of the nature of the nationwide conspiracy described by the defendants, the conspiracy charged in the indictment before us is, as a matter of law, not the 'same offense' as the other offspring conspiracies for which the defendants have been tried or indicted" (Pet. App. 13a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners, critical of dicta in the opinion of the court of appeals, fail to distinguish those dicta

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[6] The evidence showed "no more than an agreement to agree, a willingness to enter into future illegal compacts" (Pet. App. 11a-12a).

from what the court actually held, and indeed devote virtually none of their petition to defending their own "superconspiracy" theory. The holding of the court of appeals is that the record in this case supports, at most, a finding that petitioners and the other leading electrical contractors had "a passive understanding that bid-rigging was an acceptable way to do business" but that "agreements to rig individual project[s] were made only when opportunities arose and * * * the arrangements had to be negotiated 'from scratch' each time" (Pet. App. 12a). A passive understanding of the kind described is by no stretch of the imagination a conspiracy. For example, a bank robber might have a passive understanding that several of his friends would be willing and able, if asked, to drive the getaway car, and that other friends would be willing and able, if asked, to crack the safe, the next time he robs a bank. That understanding does not amount to a conspiracy between the bank robber and his friends. If the bank robber calls on two of those friends (one expert driver and one expert safecracker) to help him rob Bank A, and later calls on the same or different friends to help him rob Bank B, the government certainly may prosecute both conspiracies separately, as long as both arrangements were negotiated "from scratch." The *holding* of the court of appeals is unassailable.

Rather than attack that holding, petitioners have seized on a comment in the opinion of the court of appeals that could not be correctly applied to the facts of this case and was not the basis of the decision. The court of appeals suggested that there is a class of cases in which the government "may choose to prosecute the parent conspiracy, or it may charge the individual offspring separately" (Pet. App. 12a).

Whatever the merits of that observation generally, it is certainly incorrect if it was meant to imply that the government could have prosecuted something that was "no more than a passive understanding" (*ibid.*) as a conspiracy. "[T]he essence of" any conspiracy "is an agreement to commit an unlawful act" (*Iannelli* v. *United States*, 420 U.S. 770, 777 (1975)), and petitioners' "passive understanding" of what was "acceptable practice in the industry" (Pet. App. 10a) was not such an agreement.

If the government had indicted petitioners for a superconspiracy, and the court of appeals had held that the record in this case supported such an indictment, the court of appeals would have committed error. That is not what happened, however. The court of appeals merely included a dictum that may have been erroneous in an opinion reaching an entirely correct result. That dictum is not a basis for this Court to grant certiorari.

2. a. Petitioners contend that the court below held "that it is permissible for the government to divide a single conspiracy into separate conspiracies and prosecute a defendant in successive indictments for those separate conspiracies" (Pet. 8). From this premise, they argue that the decision below conflicts with this Court's decision in *Braverman* v. *United States*, 317 U.S. 49 (1942), and with the decisions of courts of appeals following *Braverman* (Pet. 8-11). Petitioners' premise is incorrect, however, and no conflict exists.

The court of appeals, far from rejecting *Braverman*, expressly relied on *Braverman* and its own opinions following *Braverman* (Pet. App. 3a-4a). The court recognized that, if an indictment is based on an agreement that is "part" of a larger agreement

on which a former prosecution was based, it "must be dismissed" (*id.* at 4a), and the court did not say, as petitioners repeatedly claim (Pet. 6, 11, 14), that the Spurlock and WPPSS conspiracies were "part" or "parts" of a larger agreement. The court of appeals merely rejected the proposition that a former conspiracy prosecution bars a later one whenever both conspiracies "are, in some sense, products" of a larger understanding (Pet. App. 11a). As the court made clear, the Spurlock and WPPSS conspiracies were "products" of the national "superconspiracy" only in the sense that petitioners might have known "that the [other] participants w[ould] be receptive to requests that some future project be rigged" (*id.* at 12a).

Bids were rigged on a particular project only after an agreement relating to that project was negotiated "from scratch" (Pet. App. 12a). Knowledge that bid rigging was an accepted way of doing business for many companies in the industry simply made negotiations leading to specific agreements to rig bids easier; it did not guarantee that any particular bid would be rigged. Thus, each specific bid-rigging agreement was "independent" of the so-called superconspiracy and a "distinct violation[]" (*ibid.*). On that basis, the court held that the Spurlock conspiracy was "not the 'same offense'" as the WPPSS conspiracy (*id.* at 13a). Therefore, the government could prosecute each individual agreement to rig bids separately (*ibid.*). That essentially factual determination does not conflict with *Braverman* and is entirely consistent with the decisions of other courts of appeals.[7] It does not warrant review by this Court.

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[7] See, *e.g.*, *United States* v. *Sargent Electric Co.*, 785 F.2d 1123, 1132 (3d Cir. 1986) (Stapleton, J., concurring) ("to a firm interested in bid rigging, knowledge as to the identity and

b. Petitioners claim specifically (Pet. 2, 6, 10) that the decision below conflicts with the decision in *United States* v. *Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984). The court below did criticize the rationale of *Beachner*, but that criticism falls far short of a conflict warranting review by this Court.

In *Beachner*, the Tenth Circuit was, apparently, willing to uphold (as not clearly erroneous) the district court's inference of an overarching conspiratorial agreement because "asphalt contractors in Kansas understood for over twenty-five years that the ability to rig bids was available using [a specified] method" (729 F.2d at 1283). The court in this case explicitly labeled that approach "invalid," and indicated that the Tenth Circuit should have examined "the factual nature of the parent and offspring agreements" and "the relationship between them" in order "to determine whether the offspring are independent of or dependent on the parent" (Pet. App. 11a). That single disagreement with *Beachner*'s reasoning, however, does not mean that the court below would have found separate conspiracies in *Beachner*

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trustworthiness of others willing to do the same is of great value * * *," but it is irrelevant to the determination whether bid rigging at different locations was the result of a single conspiratorial agreement or multiple agreements), cert. denied, No. 85-1936 (Oct. 6, 1986); *United States* v. *Korfant*, 771 F.2d 660, 663 (2d Cir. 1985) (fact that "single common actor" participated in and allegedly directed "two sets of conspiratorial activities" that had the common objective of fixing certain grocery prices "d[id] not establish the existence of a single conspiracy" when the evidence established that the conspiracies were functionally independent); *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117, 128 (7th Cir. 1978) (dictum) (conspiracies that are "spawned" by a larger agreement can be separately prosecuted).

or that the *Beachner* court would have found a single "superconspiracy" here.[8]

There were many additional factors present in *Beachner*, and absent here, that supported a determination that there was a single conspiracy in that case. There was undisputed evidence establishing that there had been a single conspiracy to rig bids in Kansas before 1972 (729 F.2d at 1280). Although the government contended that the single conspiracy had ended in 1972, when the company that directed the bid rigging went out of business and the State changed its procurement methods (*ibid.*), the courts found instead as a matter of fact that the conspiracy was "self-perpetuating in nature" (*id.* at 1282). The Tenth Circuit also found that the various bid-rigging agreements were mutually dependent and interrelated, noting that the conspirators created reciprocal obligations that kept the conspiracy continuing from project to project (*id.* at 1280 & n.5, 1282). That factor is notably absent from the present case, in which the court specifically rejected the "theory that Spurlock was the *quid pro quo* for WPPSS 1 & 4" (Pet. App. 6a) and was not urged to find any other interdependence.

All of the separate bids in *Beachner* were made to a single customer, the Kansas Department of Transportation. By contrast, petitioners' theory is that every bid rigged for any customer anywhere in the country was part of a single conspiracy. *Beachner* also involved a persistent " 'common method' of 'set-

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[8] Most obviously, the holding by the *Beachner* court that the trial court's findings of fact were *not* clearly erroneous cannot be taken to mean that contrary findings of fact, on a different record (or even the same one), *would* have been held to be clearly erroneous.

ting up' a job," which apparently any contractor in Kansas could " 'plug[] into' at any time" (729 F.2d at 1282). The courts below found no similar evidence in this case.[9] Indeed, the court of appeals that considered the Philadelphia conspiracy (which would be part of petitioners' "superconspiracy" if their theory were accepted) found enormous differences between the way petitioners and their co-conspirators did business in different locations (*Sargent Electric Co.*, 785 F.2d at 1131; *id.* at 1132-1133 (Stapleton, J., concurring)).

In these circumstances, there is no real conflict between the decision below and *Beachner*. The two courts of appeals applied their methods of analysis to two very different factual situations and, not surprisingly in light of the factual differences, reached different conclusions. That is not the kind of conflict in the circuits that requires resolution by this Court.

c. Petitioners attack use of the "same evidence" test in distinguishing single from multiple conspiracies, and complain that the approach adopted by the court of appeals in this case is equally unworkable (Pet. 11-14). Petitioners' attacks on the "same evidence" test are of no particular moment, however, because the court of appeals agreed with them that a "totality of the circumstances" test was preferable (Pet. App. 4a). Petitioners' attacks on the approach

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[9] The magistrate found that there was "a [de minimis] overlap in personnel between the" various conspiracies that petitioners suggest might be part of the superconspiracy (C.A. App. 459-460). "That, coupled with an overly broad time period of twelve years, various unconnected overt acts, and geographically distinct phone conversations and meetings from which bid rigging was to have arisen, all support a theory of separate conspiracies" (*id.* at 460 (footnotes omitted)).

that the court of appeals *did* use are either wrong, or premature, or both. If petitioners are suggesting that a court should not attempt to distinguish a mere "passive understanding" about acceptable industry practice from an actual conspiratorial agreement, they are simply wrong. Such a "passive understanding" is not an agreement, and without an agreement there is no conspiracy (see pages 7-8, *supra*). If petitioners' complaint is that the court of appeals suggested that a "passive understanding" is a "prosecutable offense[]" (Pet. 14), then we agree with them that that suggestion, if intended, was erroneous (see pages 7-8, *supra*). It will be time enough to correct that error, however, when and if any court ever *holds* that an indictment based on such a "passive understanding" is sufficient. Petitioners, who have not been prosecuted on the basis of a "passive understanding," are not entitled to a writ of certiorari simply because the court of appeals may have suggested that such an understanding was itself prosecutable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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